

The issue of contention arises from the fact that she had a preexisting fibromyalgia condition whose symptoms somewhat overlapped with those of her back injury of 3/15/11. Though a poor historian, claimant testified her symptoms had worsened as the result of her accident and the Court finds her testimony to be credible, and

together with the medical evidence, is sufficient to establish that her need for surgery was caused by the accidental injury of 3/15/11.¹

Respondent requests review of whether claimant needs the medical treatment recommended lumbar spine surgery due to her alleged accident on March 15, 2011. Respondent argues that Dr. Do reviewed claimant's medical history and was in a better position to give his medical causation opinion.

Claimant argues that her need for back surgery was caused by her accidental injury of March 15, 2011, and, therefore the ALJ's Order for Medical Treatment should be affirmed.

The sole issue raised on review is whether or not claimant's accidental injury arose out of and in the course of employment with respondent.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Two preliminary hearings were held in this matter. At the March 27, 2012, preliminary hearing, claimant requested additional medical treatment for her back. Respondent asserted claimant no longer needed treatment, as her treating physician, Dr. Zhengyu Hu, indicated claimant had reached maximum medical improvement. Claimant described her March 15, 2011, accident as follows:

I put the sides down on the Gaylord. I went to get out. My foot got stuck in the hole. I went to the right. Caught myself with my right arm and pulled the muscles and my back went out.²

Claimant described a Gaylord as a big plastic box that is six feet by six feet by four feet deep. Claimant fell to the ground and tore the muscles on her left inner leg, and injured her lower back and left hip. She also hurt her arm, but that resolved. Claimant testified that since the accident, she was treated by Dr. Hu. Claimant received lumbar facet injections on one occasion and she testified that the injections helped for about a week and a half. Claimant testified that she had only received treatment from Drs. Hu and Garrett. Dr. Garrett's records were not placed into evidence at the March 27, 2012, preliminary hearing.

¹ ALJ Order (Apr. 4, 2013) at 2.

² P.H. Trans. (Mar. 27, 2012) at 6.

Claimant testified at the March 2012 preliminary hearing that her back was still hurting and that she would like to have an MRI performed on her lower back and left hip. She had a previous lower back surgery in 2002. Claimant testified on cross examination that she did not have any problems with her back after 2002.

Claimant testified that she was asymptomatic before the March 2011 incident, but after the accident her lower back pain worsened with time. Claimant's last day worked was May 31, 2011, due to layoffs. She testified that she is not able to do repetitious work because it aggravates her fibromyalgia.

The medical records placed in evidence at the March 27, 2012, preliminary hearing included an August 30, 2011, report from Dr. Hu. That report indicates claimant was examined and evaluated by Dr. Hu at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Hu diagnosed claimant with pain in the following areas: low back, bilateral SI joint, right left groin region and right shoulder.

On November 22, 2011, claimant had a follow-up appointment with Dr. Hu regarding her low back pain. Upon physical examination, claimant had tenderness along the left lumbar paravertebral region. Dr. Hu opined that claimant had reached maximum medical improvement with regard to her low back pain.

Following the March 27, 2012, preliminary hearing, ALJ Avery issued an Order appointing Dr. Pat Do, "[f]or evaluation and disability rating regarding an alleged work-related injury sustained by claimant allegedly with this respondent, and recommendations regarding what future medical treatment is appropriate, if any."³ Neither of the parties appealed ALJ Avery's Order.

Dr. Do evaluated claimant on May 7, 2012. His impressions were myofascial back pain with some components of her pain due to her fall. He also indicated that claimant had underlying fibromyalgia and her previous L4-5 laminectomy and discectomy predisposed her to degenerative disk disease. In his report to ALJ Avery, Dr. Do stated:

If her history is true within a reasonable degree of medical probability, then I think that certain fall can aggravate, accelerate, and make active her symptoms. I recommend an MRI scan of the lumbar spine, some physical therapy, antiinflammatory medication, muscle relaxants, back brace, and trigger point injections.

She does not want any kind of surgery and if she were to go on to need any kind of surgery, then I think the reason for surgery would definitely be her preexisting

³ ALJ Order (Mar. 28, 2012) at 1.

issues, such as her L4-L5 degenerative disk disease from her laminectomy discectomy.⁴

Dr. Do referred claimant to Dr. Mellion, a board certified neurosurgeon, who examined and evaluated claimant on October 25, 2012. Dr. Mellion performed a physical examination and diagnosed claimant with degenerative lumbar disc disease, spinal stenosis and possible thoracic or lumbosacral neuritis. He reviewed a June 11, 2012, MRI of the lumbar spine, which revealed disc degeneration, disc space collapse, Modic type changes at the endplates, spondylitic changes, facet arthropathy and bilateral foraminal narrowing at L4-5 consistent with claimant's symptoms. He opined claimant was symptomatic because of her disc space collapse, Modic type changes at the endplates, spondylitic changes, facet arthropathy and bilateral foraminal narrowing at L4-5. The doctor recommended a re-exploration and transforaminal interbody fusion and post instrumental fusion at L4-5 in hopes of improving her symptoms. Dr. Mellion opined that claimant's accidental injury on March 15, 2011, was the prevailing factor in her need for surgery. He also testified,

[t]hat given the fact that she did well after a micro discectomy for quite some time, and it did not become symptomatic until her work-related accident, it is within a reasonable degree of medical certainty that a work injury is, in fact, work-related to the symptoms, and may show exacerbation of an underlying problem.⁵

Dr. Mellion testified his causation opinion was based upon information provided to him by claimant. Dr. Mellion had not reviewed Dr. Do's records. When Dr. Mellion was asked if he had any reason to disagree with Dr. Do's opinion that claimant's need for surgery was definitely due to preexisting issues, Dr. Mellion indicated that he did not. However, on redirect testimony, Dr. Mellion also indicated he would agree with Dr. Do's statement that, "If her history is true, within a reasonable degree of medical probability, then I think that certain fall can aggravate, accelerate and make active her symptoms."⁶

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of

⁴ P.H. (Feb. 14, 2013) Resp. Ex. A at 2.

⁵ Mellion Depo. at 9.

⁶ P.H. (Feb. 14, 2013) Resp. Ex. A at 2.

⁷ K.S.A. 2010 Supp. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.

This is an "Old Law" claim, as claimant's accident occurred prior to May 15, 2011. Consequently, if claimant's March 15, 2011, accident aggravated, accelerated or exacerbated her pre-existing back condition, then claimant's back injury is compensable. Dr. Mellion testified that within a reasonable degree of medical certainty that claimant's accident exacerbated her underlying medical condition. There is some dispute about whether claimant had symptoms of back pain prior to her March 15, 2011, accident. Dr. Mellion indicated that if claimant was asymptomatic prior to her March 15, 2011, accident, then the accident caused her back condition to become symptomatic. The doctor also testified that if claimant's back condition was intermittently symptomatic prior to March 15, 2011, and after the accident the symptoms became severe and constant, then claimant's preexisting condition was exacerbated by the accident.

The medical evidence and claimant's testimony are sufficient to prove by a preponderance of the evidence that claimant's March 15, 2011, accident aggravated or exacerbated her preexisting back condition. Therefore, this Board Member agrees with Judge Avery's finding that claimant met with personal injury by accident arising out of and in the course of her employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, the undersigned Board Member finds that the April 4, 2013, preliminary hearing Order for Medical Treatment entered by ALJ Brad E. Avery is affirmed.

IT IS SO ORDERED.

⁸ K.S.A. 2010 Supp. 44-508(g).

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2010 Supp. 44-555c(k).

Dated this 28th day of June, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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